United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1947

To be argued
Frederick H. Cohn

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

Docket No. [redacted]

-against-

HENRY STUART BROWN,

Defendant-Appellant

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR THE APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 73 1960

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-against-

HENRY STUART BROWN,

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BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

This is an appeal from verdict of the United States District Court for the Eastern District of New York, before Honorable Judge Jacob Mishler, finding the appellant guilty of 18 U.S.C. 2113 (d) for which he was sentenced to a term of twenty years in prison, to run consecutively to a term presently being served in the State of Missouri for twenty five years.

FACTS

On January 10, 1972 a Bankers Trust Company branch at 896 DeKalb Avenue, Brooklyn, New York, was robbed by three armed men. Fingerprints were lifted from a door to the cashier's cage, (p. 262a) and forwarded to Washington, D.C. for identification where no identification was made. (p. 26a-28a) At this time, Henry Brown's fingerprints were already on file in Washington (p.29a-31a) and Henry Brown was already a suspect in the case. (p. 30a) Apparently, however, a check against his fingerprints was not run until June 5, 1972 (p. 30a) Positive identification of the fingerprints in question was made as those of Henry Stuart Brown.

Henry Stuart Brown was indicted on November 1, 1972 some seventeen months after the identification. The Government has refused at all proceedings to offer any justification or reason for the delay. (p. 30a, 12-15a) A motion to dismiss based on pre-indictment delay was timely made and denied.

Throughout the proceedings, from motions through trial, there was disagreement between the court and defense counsel as to the propriety of bringing the defendant's membership in the Black Liberation Army into the trial. The court regarded this issue as a collateral one appealing to the emotion of the jury. (p. 316a) Counsel asserted that the defendant's nexus to a "revolutionary" group could affect the credibility of government witnesses in terms of the government's desire to destroy the group

and its members. (p. 311a-317a) Counsel was forbidden to mention the Black Liberation Army either during voir dire or during the trial in the presence of the jury, and the record will reflect absolute obedience to that rule of the court. During the trial, an accomplice, Wilbur Roland, testified, who received substantial immunity from prosecution because of what he told police authorities about the Black Liberation Army. (p. 133a-134a) Although the government knew there was an informer, it not only refused to divulge his name (p. 133a-134a) but refused, in open court, to state whether or not "informant" testimony would be used. (p. 301a)

POINT I

THE GOVERNMENT'S DELAY BETWEEN JUNE 5, 1972 AND NOVEMBER 1, 1973 REQUIRES DISMISSAL.

There has been substantial confusion in courts as to theeeffect of pre-indictment delay. The motion to dismiss in the instant case was made pursuant to the due process clause of the Fifth Amendment and not under the speedy trial provisions of the Sixth Amendment. United States v. Marion, 404 U.S. 307 (1971) teaches us that this is proper and advises us that the statute of limitations is merely an outside limit beyond which no indictment may be brought. But, where the government has all the facts necessary to indict and elects not to do so, such election should be made at the peril of the Government.

It is clear, on the facts of this case, that as of June 5, 1972, the date of positive fingerprint identification, the government had enough evidence to indict, and did so on November 1st, 1973, without acquiring any new evidence. During that time, Henry Brown was incarcerated in Missouri where agents had visited him and therefore he was amenable to early trial should he be indicted. Yet, the government offers no reason for the delay, not adminstrative necessity, complication of preparing a case, or any other. See United States v. Stein, 456 F.2d 844 (2nd Cir. 1972)

No court has spoken on whether the United States Attorney's refusal to state any reason for delay is in itself reason for remand, but reading of the cases in this circuit touching on the issue of pre-indictment delay indicates that the confusion over the Marion test has not been dispelled in this circuit. Compare United States v. Ferrara, 458 F.2d 868 (2nd Cir. 1972); United States v. Schwartz, 464 F.2d 499 (2nd Cir. 1972), cert. denied, 409 U.S. 1009 (1972).

Appellant respectfully submits that an indictment must be dismissed where a defendant has been prejudiced by undue delay between the discovery of the crime and indictment or where the delay was an intentional device to gain tactical advantage over the accused. This court, in Ferrara, supra, seemed to accept the disjunctive.

> Moreover, it likewise is clear that the due process clause of the Fifth Amendment does not help appellants, for they have failed to show that the pre-indictment delay caused substantial prejudice to their right to a fair trial or that the delay was a purposeful device to gain tactical advantage over them. (Emphasis supplied)

United States v. Ferrara, supra, at 875

Schwartz, supra, however, citing United States v. Marion, supra, at footnote 5, seems to hold the opposite for the proposition that actual prejudice from pre-indictment delay might require a dismissal. The court, in United States v. Schwartz, supra,

discussing Marion in pertinent part, said

> The Court in Marion indicated that the Due Process Clause would require dismissal of the indictment "if it were shown at trial that the pre-indictment delay...caused substantial prejudice to appellee's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. 404 U.S. at 324, 92 S.Ct. at 465 [footnote omitted] Although appellant in the instant case claims actual prejudice, he does not assert, and the record in no way indicates, that the Government delayed bringing the indictment in order to secure a "tactical advantage" over the accused.
>
> The Court in Marion set forth no guidelines for making the "delicate judgment," 404 U.S. at 325, 92 S.Ct. 455, as to when actual prejudice alone warrants the dismissal of an indictment for pre-accusation delay." (Emphasis supplied)

United States v. Schwartz, 464 F.2d 499, 503 (1972)

Appellant respectfully suggests this reading of Marion is in error. The section quoted in Schwartz in footnote 5 (quoted in full, supra) is the government's view as to the law as argued in Marion, but does not constitute the holding of the case which does not occur until the following two pages and is ambiguous since the Court found neither prejudice nor an allegation of misconduct.

In the case at bar, there is an allegation of misconduct which concededly is unsubstantiated. The new delay, under these circumstances of an uncomplicated arrest and sufficient proof to indict, which proof is not increased by the time of indictment, raises a suspicion which the government should at least deny.

The government does not deny, but in fact, affirmatively refuses to respond to the query.

Other circuits seemed to have accepted at least the principle that prosecutorial misconduct is an independent ground on which an indictment can be dismissed for delay. See, United States v. Erickson, 472 F.2d 505, 507 (9th Cir. 1973); United States v. Bishton, 463 F.2d 887, at 891 (D.C.Cir. 1972); United States v. Macino, 486 F.2d 750 (7th Cir. 1973); United States v. Schools, 486 F.2d 557 at 558 (5th Cir. 1973).

If this circuit should accept this analysis then the failure of the government to come forward with an explanation of that delay should mandate at the very least a remand to compel the government to respond and determine whether or not the delay was for some tactical advantage which cannot be known to the appellant.

POINT II

FAILURE TO PERMIT CROSS EXAMINATION OF WILBUR ROLAND AS TO CONSIDERATION RECEIVED FOR INFORMATION AS TO BLACK LIBERATION ARMY WAS ERROR.

Wilbur Roland testified that he was the driver of the getaway car on January 10, 1972. He received immunity, in return for information, from an armed robbery in February, 1973, a violation of probation which would have arisen out of that robbery, as well as immunity for his girlfriend, Dianne Richardson. (pp. 16a-19a) (Tr. 199-202) In addition, he was not prosecuted for another armed robbery in which a policeman's gun was stolen (p.37a) (Tr. 203) nor was he prosecuted or even indicted for the bank robbery in the case at Bar. All of this information was brought out on cross-examination.

After the defendant had testified, counsel was handed, as Jencks material, a transcript of an interview between Mr. Roland and an Assistant District Attorney, for Kings County, in which the following colloquy took place:

> Question: (From A.D.A. Fruendlich) I am willing to make you an offer and this is the offer that I will put on the record at this time. The information you give us about the different robberies involving the Black Liberation Army specifically to an incident with the hand grenade in Queens and the killing of two policemen in Manhattan. If this is information that checks out to be correct, if this

information also helps your testimony what you have to do is testify in the Grand Jury and the trial, we can take your case Jack and we will dismiss it. In other words, you will not be prosecuted for your robbery charge and the same with the other robbery we discussed. Now you are also interested in Dianne Richardson, is that correct?

Answer: That is correct.
(p. 134a-135a) (Tr. 300-301) (Exhibit 24 for Identification)

Despite initial denials during a voir dire out of presence of the jury at which time counsel sought to have the court reverse its earlier ruling, Mr. Roland admitted he gave substantial information as to Black Liberation Army Activity (p. 135a-136a). The government claimed no other notes or transcripts as to Mr. Roland's prior statements had been made.

Mr. Roland's testimony was obviously deemed important by the Government. It is also quite apparent that the Government, when they refused to inform either counsel or the court as to whether or not informant testimony would be used, was aware of the consideration given for information on Mr. Brown. That consideration was given because Brown was a member of the Black Liberation Army and yet the government permitted the court to make a ruling based on incomplete information which led the court to believe that the Black Liberation Army was a collateral issue.

> The Court: If this were a political trial, if they were charging Mr. Brown with engaging in some kind of activity on behalf of the Black Liberation Army front I would say, sure it belongs there, but this is a bank robbery.
> (p. 316a) (Feb. 1st Tr. p. 14)

Having adhered to the ruling through trial and having not permitted inquiry as to bias on the Black Liberation Army during voir dire, it is small wonder that the court refused to reverse itself.

Failure to permit, however, full cross examination as to the reason for consideration to an accomplice, under the circumstances infra constitutes reversible error.

It need not be argued at length that the right to full cross examination of witnesses is a constitutional question, under the confrontation clause of the Sixth Amendment to the United States Constitution. Davis v. Alaska, 94 S.Ct. 1105, ___ U.S. ___ (1974); Greene v. McElroy, 360 U.S. 474 (1959); Smith v. Illinois, 360 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931). What concerns us here is whether the broad discretion of the trial judge to control cross examination was abused in this case. That discretion is very narrowly defined by the Supreme Court.

> Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross examiner has traditionally been allowed to impeach, i.e., discredit, the witness.
> Davis v. Alaska, supra, at 1110 (Emphasis supplied)

It is a discretion aimed at preventing undue repetition which would substantially lengthen the trial or to prevent mere harassment. That is the limit of the discretion of the court and it may not take away from the jury any fact which has not been heard by them before and might tend to impeach the witness. See, Greene v. McElroy, supra, at 496.

It is even more essential to circumscribe this discretion where the cross-examination is directed at an accomplice. See, United States v. Padgent, 432 F.2d 701 (2nd Cir. 1970); See, Napue v. State of Illinois, 360 U.S. 264 (1959); Gorden v. United States, 344 U.S. 414 (1953).

> An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect for such a witness may well have an important personal stake in the outcome of the trial. An accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony. (Citing with approval, United States v. Gonzalez, 488 F.2d 833 (2nd Cir. 1972) Padgent, supra, at 702

It is not sufficient that other discrediting cross examination was permitted, The court may not try to think with the jury which is the sole trier of the credibility of witnesses and say what new material is redundant. See, Davis v. Alaska, supra, at 1111; Brookhart v. Janis, 384 U.S. 1, 3.(1966).

> Second, we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest

> in testifying against petitioner turn what was otherwise a tainted trial into a fair one.
> Napue v. State of Illinois, supra, at 270.

In criminal cases especially, defense counsel should be given great latitude in adducing proof which might bear on credibility. United States v. Wolfson, 437 F.2d 862 at 874 (2nd Cir. 1970). To argue that to admit the evidence complained of would open a Pandora's box of collateral matters is to ignore the Court's function to keep such issues within reasonable bounds while letting them in for their probative value. A defendant's major weapon when faced with inculpatory testimony of an accomplice witness is to discredit such testimony by proof of bias or motivation to falsify.

Evidence of such nature is never collateral. United States v. Blackwood, 456 F.2d 526, 530 (2nd Cir. 1972); United States v. Lester, 248 F.2d 329 at 334 (2nd Cir. 1957); United States v. Haggett, 438 F.2d 396, 399 (2nd Cir. 1971), cert. denied, 402 U.S. 946 (1971).

As this court said in Haggett, supra,

> Evidence of all facts and circumstances which "tend to show that a witness may shade his testimony for the purpose of helping to establish one side of a cause only," should be received.
> Id. at 399.

It is not merely that a witness received immunity that is important, but why he received immunity and how. See, Sandroff v. United States, 158 F.2d 623 (6th Cir. 1946). Complete foreclosure

of cross examination as to a subject matter relevant to the witness' credibility which may have deprived the jury of information bearing on the trustworthiness of crucial testimony cannot be treated as falling within the court's discretion. United States v. Kartman, 417 F.2d 893, 897 (9th Cir. 1969)

Wilbur Roland may have been influenced by what he knew to be the importance attached to the Black Liberation Army by police authorities. The pressures brought to bear on him and how his information was elicited from him is vital in letting the jury assess his ultimate motivation to lie. The jury might have considered that the witness' mind operated in a way where he thought that had he not come up with information on Brown and the Black Liberation Army, his punishment would indeed be harsher than might otherwise be expected.

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.
> Napue v. State of Illinois, supra, at 269.

It is the normal tactic at trial for defense counsel to attempt to exclude those issues which would tend to inflame the jury against his client, (See, United States v. Elynn, 216 F.2d 354 (2nd Cir. 1954), and where the facts to be excluded have no other probative value they are generally so excluded. But here, as in the Smith Act Cases, the defendant's protection from being

treated as a political pariah shall be waived where it is clear he was not raising a phantom issue. Adequate limiting charges are available. Upon proper voir dire the jury could clearly have been selected with an eye toward protecting the defendant from any prejudice which might accrue to him. It is the traditional role of an American Jury to be able to perform that function. If the defendant wishes to take that risk with the advice of competent counsel, that risk is his to take and the court cannot prevent it by raising the bogie of a collateral issue.

POINT III

THE PHOTOGRAPHS ARE NOT A PROPER SUBJECT FOR EXPERT TESTIMONY AND THEREFORE THE USE OF AN EXPERT WITNESS INVADED THE PROVINCE OF THE JURY.

At trial, Frederick E. Webb, a special agent of the F.B.I. and an alleged photographic identification expert, compared seven photographs of the robber taken by the bank surveillance camera, and three police photographs of the defendant taken prior to trial. The expert witness pointed out similarity of features between the individual in the bank surveillance photographs and the individual in the police photographs, and he testified upon that basis that the individual in both sets of photographs was either the same individual or one having all the same features. (pp. 201a-202a) (Tr. 364-365)

Opinion evidence may not be received as to a matter upon which a jury can made an adequate judgment. Salem v. United States Lines Co., 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed. 2d 313 (1962); Fineberg v. United States, 393 F.2d 417 (9th Cir. 1968), People v. Graydon, 43 A.D.2d 842, 351 N.Y.S. 2d 172 (App.Div. 2d Dept. 1974).

It is a general rule that the use of expert testimony requires that the subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the knowledge of the average layman. Jenkins v. United States, 307 F.2d 637, 641-643 (D.C.Cir. 1962). The identification of a person from a photograph or the comparison

of the individuals in two sets of photographs is within the ability of the average jury.

Mr. Webb in his testimony admitted that no scientific measurements were taken of the facial features. The entire basis of the expert witness's opinion was "just...a side by side comparison." (p.227a) (Tr. 390) of the photographs which a jury obviously could accomplish on their own. The photographs were physical facts of evidence which were simple, direct, and could readily be understood and evaluated by the jury and an appropriate conclusion drawn. To then allow an expert to do the evaluation and draw the conclusion is to invade the province of the jury.

Salem v. United States Lines Co., supra, though a civil case, is often cited in criminal cases to determine whether the subject under consideration is a proper one for expert testimony. E.g., United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973) The Supreme Court in reaching the conclusion that the safety of a crows nest was not a proper subject for expert testimony considered the question of whether there were "peculiar fact circumstances which made it impossible for a jury to decide intelligently...." Salem v. United States Lines Co., supra, at 35. Using that same test here, is there any circumstance which makes it impossible for a jury to intelligently compare two photographs and determine if the individual in both is the same or a different person? Admittedly, such circumstances exist when one is com-

paring fingerprints, voiceprints or handwriting. There the subject is not within the experience of the average jury. There precise measurements or scientific instruments are necessary, not merely the side by side viewing Mr. Webb admitted was his sole test. The court in United States v. Cairns, 434 F.2d 643 (9th Cir. 1970) evidently missed this obvious distinction.

United States v. Cairns, supra, concerned the testimony of an expert witness comparing photographs of the robber taken by the bank's surveillance camera and police photographs of the defendant. Despite objection that this testimony was admissable as an aid to the jury and relied upon previous decision concerning handwriting and fingerprint identification.

The distinction between an expert comparing fingerprints and handwriting and an expert citing similarities in photographs is readily apparent. Mr. Webb, the expert witness in both this case and Cairns, states that photographic identification is not similar to fingerprint identification. (Tr. 332) (p. 166a) It is not within the experience of the average person to identify persons from their handwriting or their fingerprints. The average person, however, comes into almost daily contact with photographs and regularly identified photographs from people they know, or identifies real persons from photographs they have seen. Thus identification from photographs, unlike the sciences of fingerprint and handwriting identification, is easily within the

experience and understanding of the average man.

The court in United States v. Evans, 484 F.2d 1178 (2nd Cir. 1973) recognized the ability of the jurors to make an intelligent determination of the likeness of the robber on the surveillance film with the defendant in the courtroom.

> [T]he surveillance film was shown to the jury and they were able to make the comparison for themselves between the defendant, sitting before them in open court, and the person of the robber as caught by the eye of the surveillance camera at the time of the robbery.
> United States v. Evans, supra, at 1186.

The circumstances in the case at hand are even more compelling than in Evans. There the jurors viewed a moving two dimensional film and compared it with the stationary, three dimensional defendant. Here the jurors face the task of comparing two dimensional photographs from the bank's camera with two dimensional photographs of the defendant. From the testimony of Agent Webb, it is clear that every safeguard was taken to insure that the photographs are as similar as possible (p. 175a) (Tr. 340). Thus their task is easier than in Evans and the expert witness did not serve to give appreciable aid, but rather functioned to shore up the credibility of simple facts.

Such use of an expert witness is "intolerable" according to the court in People v. Graydon, 43 A.D.2d 842, 351 N.Y.S.2d

(App.Div.2d Dept. 1974).

> [I]t is intolerable to permit a witness, cloaked in the garb of apparent expertise, to assume the function of the jury and attempt to answer the ultimate fact issue presented or to comment upon the truthfulness of fact testimony theretofore given.
>
> People v. Graydon, supra, at 174

The photographs in the case at hand presented no peculiar fact circumstance which made it impossible for the jury to consider them intelligently on their own, therefore the photographs should be treated as mere facts in evidence; the camera, a mute witness. The jury was not allowed to evaluate the evidence on their own, and consider the testimony of the mute witness, the camera, without intereference. This was error. The expert witness was not an appreciable aid to the jury, but rather a trespasser in their province.

POINT IV

THE TRIAL COURT DEPRIVED DEFENSE COUNSEL OF A SUBSTANTIAL RIGHT BY PRECLUDING HIM FROM ARGUING TO THE JURY THAT A MISSING WITNESS INFERENCE COULD BE DRAWN AGAINST THE GOVERNMENT.

During the defense counsel's summation the judge allowed comment upon the missing evidence of the recovery of the stolen car. (p. 265a-267a) (Tr. 515-157) However, when counsel urged the jury to infer that "had it been brought forward [it] would not have been favorable to the government's case," (p.268a) (Tr. 522) the court interrupted and instructed the jury:

> I do not agree with that principle of law and I will charge you on the failure of the Government to, one, produce witnesses, and two, the failure to produce evidence, enough evidence to satisfy its burden.
> (p. 268a) (Tr. 522)

Defense counsel was thus precluded from urging the jury to draw an adverse inference against the government because of its failure to produce testimony. This interference by the trial court during defense counsel's summation clearly deprived counsel of a substantial right.

In United States v. DiBrizzi, 393 F.2d 642 (2nd Cir. 1968) the prosecutor had commented upon defense's failure to call a key witness equally available to both sides. The court stated:

> Within broad limits, counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence.
> United States v. Dibrizzi, supra, at 646.

The Dibrizzi court held that the prosecutor's comments were not in error and totally complied with the rule in the circuit.

> As to whether it is permissable to draw any inference at all from a party's failure to call a certain witness when that witness is equally available to both parties there is indeed a split of authority. See, e.g., Johnson v. United States, 291 F.2d 150, 154-55 (8 Cir. 1961) (no inference); McClanahan v. United States, 230 F.2d 919, 925 (5 Cir.) cert. denied, 352 U.S. 824, 77 S.Ct. 33, 1 L.Ed. 2d 47 (1956) (no inference); United States v. Jackson, 357 F.2d 41, 43-44 (3 Cir. 1958) (inference). However, the better rule, see 2 Wigmore Evidence 169-171 (3d. Ed. 1964 Supp.); McCormick, Evidence 534 (1954), is the rule in this circuit, [Citations Omitted] namely, that the failure to produce such a witness is open to an inference against either party.
>
> United States v. Dibrizzi, supra, at 646.

The court in United States v. Dibrizzi, supra, relies upon McCORMICK, EVIDENCE, 534 (1954) and WIGMORE, EVIDENCE §288 (3d ed. 1964 Supp.). See also United States v. Beekman, 155 F.2d 580 (2nd Cir. 1946) and United States v. Cotter, 60 F.2d 689 (2nd Cir.), cert. denied, 287 U.S. 666, 53 S.Ct. 291, 77 L.Ed. 575 (1932). McCormick writes:

> ...[E]quality of favor is nearly always debatable, and...though the judge thinks the witness would be as likely to favor one party as the other, he should permit either party to argue the inference against the adversary.
>
> MCCORMICK, supra, at 534.

Wigmore says:

> ...[T]he more logical view is that the failure to produce is open to an inference against both parties, the particular strength of the inference against

> either depending on the circumstances. To prohibit the inference entirely is to reduce to an arbitrary rule of uniformity that which really depends on the varying significance of facts which cannot be so measured.
>
> WIGMORE, supra, at §288.

Since United States v. Dibrizzi, supra, holds that McCormick and Wigmore present the better rule and the rule in this circuit, (at 646), the judge in the case at hand clearly erred. This error deprived counsel of a substantial right.

In United States v. Jackson, 257 F.2d 41 (3d Cir. 1958) (cited in United States v. Dibrizzi, supra, at 646) the chief witness for the prosecution testified about one "Sarge" who had helped in the discovery of the defendant's violation (selling and concealing narcotics.) "Sarge" was not called as a witness. When counsel for the defense began to comment upon his absence and urged the jury to draw an adverse inference against the government, the judge concluded that since the witness was equally available to both parties he would not permit comment.

The Appeal Court overruled:

> We think that clearly his absence was a subject of proper and vigorous comment on the part of defense counsel. [Citations omitted] To deny him the privilege of bringing this very telling point to the jury deprived him of a substantial right.
>
> United States v. Jackson, supra, at 44.

In the case at hand, Wilbur Roland was the prime witness who placed the defendant at the scene of the bank robbery, thus his credibility was an important consideration for the jury. The defense counsel placed Roland's credibility under serious attack, thus the missing witness who could have supported that credibility was an important and natural part of the building up of the government's case. United States v. Jackson, supra, at 44. Defense counsel could not reasonably be expected to call the witness since he did not have significant foreknowledge of his existence, information as to his identity, or any hint of his probable testimony. WIGMORE, supra, at §288

POINT V

THE TRIAL COURT ERRED BY CHARGING THE JURY THAT SINCE THE DEFENSE HAD THE POWER TO SUBPOENA, THE WITNESS WAS EQUALLY AVAILABLE AND THEREFORE THE JURY COULD NOT DRAW AN ADVERSE INFERENCE AGAINST THE GOVERNMENT.

A. The charge was in error because it deprived the defendant of his Fifth Amendment right to rest upon the government's burden of proof.

The court below charged:

> You should be advised that even though the defendant need not produce proof, he still has the power to subpoena anyone he wants to and where we find, and where the law finds, that witnesses are controlled by neither party, or putting it affirmatively, are under the equal control of the parties, you may not draw an adverse inference from the Govem ment's failure to produce the witness.
> (p. 274a, 275a) (Tr. 564, 565)

It is settled law that it is improper for a trial judge to call attention to a defendant's silence. The court in United States ex rel D'Ambrosio v. Fay, 349 F.2d 957 (2nd Cir. 1965) stated that language which indirectly invites the jury's attention to the accused's failure to take the stand or to present a case unless cured by prompt instruction will be grounds for setting aside the verdict. United States v. Fay, supra, at 961.

The judge's charge in the case at hand was not followed by any limiting instructions. His comment that the defense has the power to subpoena called attention to the fact that the defendant had produced no witness or evidence. Thus, the comment infringed upon his constitutional right to remain silent and rest upon

the government's burden of proof. See, Davis v. United States, 357 F.2d 438 (5th Cir. 1966), cert. denied, 385 U.S. 927 (1966).

By one-sidedly instructing the jury that they may not draw an inference against the government, the judge completely left open the question of whether an inference could be drawn against the defendant for not exercising his power of subpoena. Even allowing the possibility of such an inference is intolerable. The right of the defendant to remain silent without punishment by inference must be strenuously guarded. It is the defendant's unquestionable right to decline to produce any evidence and to stand solely upon the proposition that the state must prove a case against him.

It is sometimes said that this limitation does not apply to the missing witness inference. The court, in United States v. Crisona, 416 F.2d 107 (2nd Cir. 1969) states:

> Appellant argues that allowing the jury to draw an unfavorable inference from his failure to call a witness infringes upon his right to rest upon the Government's burden of proof. But we have long held that it is proper to instruct the jury that "the failure to produce such a witness is open to an inference against either party." United States v. Dibrizzi, 393 F.2d 642, 646 (2d Cir. 1968); see United States v. Evanchik, supra [413 F.2d 950 (2nd Cir. 1969)] at 954; United States v. Armone, 363 F.2d 385, 404-405 (2d Cir.), cert. denied, 385 U.S. 957, 87 S.Ct. 398, 17 L.Ed. 303 (1966) [Citation Inserted]

United States v. Crisona, supra, at 118

None of the cases cited by Crisona, however, present a case where the defense has rested solely upon the government's burden. In both United States v. Dibrizzi, supra, at 645, and United States v. Evanchik, 413 F.2d 950, 951 (2nd Cir. 1969), it is evident from the opinions that character witnesses were called. In United States v. Armone, 363 F.2d 385 (2nd Cir. 1966), cert. denied, 385 U.S. 957 (1966) though, two of the multiple defendants did not take the stand, some did. From the opinion, it appears as though one of the defendants, who raised the missing witness question on appeal, Grammauta, did take the stand. At the very least, a defense case was put in.

The defendant does not herein contend that once he attempts to put in a defense he waives his privilege to rest upon the government's burden. See, e.g. Rogers v. United States, 340 U.S. 367 (1951); Raffel v. United States, 271 U.S. 494 (1926).

But by remaining completely silent the defendant waives no Fifth Amendment privilege. It is an abridgement of his right to be silent for his failure to assume the burden of subpoena to be commented upon indirectly and for the jury to be precluded from drawing the adverse inference against the government, but not against the defendant.

B. The charge was in error because the witness was not "equally available" to both parties.

In his charge to the jury the judge stated that the defendant had the power to subpoena anyone he wished, and the judge evidently concluded that therefore the witness was under the equal control of both parties. (P. 275a)

It has long been held that the power of subpoena alone does not make a witness available to a party. Rather in determining the equal availability of a particular witness the liklihood of bias on the part of the person not called, United States v. Beekman, 155 F.2d 580 (2d Cir. 1946) and one party's superior knowledge of the identity of the witness and his probable testimony are all to be considered. WIGMORE, EVIDENCE, §288 (3d Ed. 1940, Supp. 1957).

The government in the case at hand failed to call an employee of another governmental body, a police officer who could have testified as to whether a car was indeed stolen from a rental car agency and recovered two blocks from Woody Green's house. The court in United States v. Beekman, supra, held that if there is a liklihood of bias on the part of the person not called, that person is not "equally available" and a missing witness inference could be urged against the party with the

greater control. The court there concluded that ". . . a party's employees come within that category." United States v. Beekman, supra, at 584.

Wigmore points out that many factors may weigh the balances more heavily upon one party to produce a particular witness.

> However, the term 'available' is not to be construed as meaning merely the accessibility for service of process. The determination of the question of equal availability may in a given situation involve the consideration of many factors. Such matters as one party's superior means of knowledge of the existence and identity of the witness, of the testimony that might be expected of him, ... are to be considered. WIGMORE, EVIDENCE, §288 (3d Ed. 1950, 1954 Supp.)

Defense counsel had no knowledge of the identity of the missing witness. Also, as defense counsel pointed out, the government advance notice of the need for such a witness while the defense was continually barred from even learning the identity of the informant prior to trial and thus did not have the same opportunity to discover the need for the witness nor his probable testimony. Defense counsel had no opportunity to learn the content of the proposed witness's testimony, because under CPL §240.10 and §240.20 police reports are protected material.

To determine, therefore, that the power to subpoena made a witness equally available is to say that defense counsel who would be forced to question blindly an employee of the government with no appreciation of whether he would aid his case or

not is an equal position of the government who could question their own employee, with advance notice of his identity and the need for his testimony, and full appreciation of the probable content of his testimony and its effect on their case. The basic inequality of this situation is obvious.

POINT VI

EVEN IF IT IS CONCLUDED THAT THE WITNESS WAS EQUALLY AVAILABLE TO BOTH PARTIES, THE COURT'S CHARGE IS STILL IN ERROR BECAUSE IT DOES NOT COMPLY WITH THE RULE IN THIS CIRCUIT THAT IF A WITNESS IS EQUALLY AVAILABLE THE INFERENCE IS PROPER AGAINST EITHER PARTY BUT OF DIFFERENT WEIGHT.

The court below charged that if a witness is controlled by neither party, or to put it affirmatively under the equal control of both parties, a missing witness inference could not be drawn from the government's failure to produce the witness. (p. 224a-275a) (Tr. 564-565)

The court's first error in this charge and the cause of its final misstatement of the rule in this circuit is to equate the situation where neither party has control to the situation where both parties have control. The two situations are very dissimilar in their nature and their effect upon the missing witness charge.

In United States v. Super, 492 F.2d 319 (2nd Cir. 1974) the missing witness was equally unavailable to both parties and the court there held that no inference should be drawn. It is logical that no party may be punished by an adverse inference for what was impossible for him to produce. It is clear, however, that an inference from what is possible but was not done is proper and logical. United States v. Super, supra, relies upon none of the leading cases where the witness was equally available, and instead

only cites those cases where for one reason or another the witness could be produced by neither party. This demonstrates the basic differences in the situations and it is erroneous to treat them as the same and that error results in an erroneous statement of the law upon the question of the missing witness inference. See also, United States v. Bergman, 354 F.2d 931, 935 (2d Cir. 1966)

This charge did not comply with the rule in this circuit where the witness is equally available to both parties as United States v. Pawlak, 352 F.Supp. 794 (S.D.N.Y. 1972) points out

> While defendant has argued that where a witness is equally available to both sides no inference should be drawn against either side, the rule in this circuit is to the contrary....
> United States v. Pawlak, supra, at 798.

The court in United States v. Beekman, 155 F.2d 580 (2nd Cir. 1946) says:

> It is sometimes said that no inference can be drawn against a party for failure to call a witness equally available to both parties.... We agree with Wigmore's criticism of that rule.
> United States v. Beekman, supra, at 584.

And finally, United States v. Dibrizzi, 393 F.2d 642 (2nd Cir. 1968) definitively states:

> As to whether it is permissable to draw any inference at all from a party's failure to call a certain witness when that witness is equally available to both parties there is indeed a split of authority.... However, the better rule, ... is the rule in this circuit, ... namely, that the failure to produce such a witness is open to an inference against either party. [citations omitted]
> United States v. Dibrizzi, supra, at 646.

The courts in United States v. Crisona, 416 F.2d 107 (2nd Cir. 1969) and United States v. Evanchik, 413 F.2d 950 (2nd Cir. 1969) following the Dibrizzi rule held that a judge's charge which allowed the jury in their discretion to draw the inference against either party or if they desired against neither party was the correct charge and entirely consistent with the fule in this circuit. In the case at hand the judge prevented the jury from exercising their discretion to draw whatever inference they desired. For the trial judge to place the exercise of that discretion in his own hands and completely forbid the jury from considering it in regard to one party is to invade the rightful province of the jury.

This error becomes even more serious when one considers the weight the inference might have had in the minds of the jury had they been allowed to consider all the circumstances surrounding the missing witnes. Judge Learned Hand in United States v. Cotter, 60 F.2d 689 (2nd Cir. 1932), cert. denied, 287 U.S. 666, 53 S.Ct. 291, 77 L.Ed. 575 (1973) stated:

> ...Perhaps, as Professor Wigmore puts it (section 288) an inference is, strictly speaking, always proper against each side, but of different weight.
> United States v. Cotter, supra, at 692.

Wigmore states that the "particular strength of the inference which can be drawn against either party is dependent upon the circumstances. WIGMORE, EVIDENCE, §288 (3d Ed. 1940, Supp. 1957).

What circumstances the jury may consider in weighing the inference has already been discussed in the previous section of this brief. (Point V, B, infra at 27) But it is clear that it includes such factors as whether the missing witness might be subject to some bias as a party's employee, whether one party has superior means of knowledge of the need, identity or probable testimony of the missing witness, and which party had the burden of proof and the more appropriate time for presenting the witness. Eastern Electric, Inc., v. Seeburg Corp., 310 F.Supp. 1126, n. 81 at 1149 (S.D.N.Y. 1969).

Since the judge invaded the province of the jury and did not allow them to exercise any discretionin this matter, it is mere supposition to determine how much weight they would have given the inference or even against whom they would have drawn it. From all the facts, however, it is obvious that all of the permissible factors weight against the government in this particular case. To refuse to allow the jury to even consider the weight those circumstances might have in relation to the missing witness is clearly error. The circumstances seem to indicate that had the jury been given the chance the inference most probably would

have been against the government. What result this would have had in their verdict is not clear, but the inference could have severely harmed the credibility of the witness Roland who was the prime witness to place the defendant as one of the bank robbers. Since Roland's testimony was undisputably important, his credibility in the eyes of the jury was of paramount concern for the defense. Any interference, therefore, in allowing the jury to consider the missing witness inference--that if the police officer had been called his testimony would not have been favorable to the government's case and might show that Roland was not telling the truth in this particular instance--is a serious error and directly harmed the defendant's case.

CONCLUSION

FOR ALL THE ABOVE REASONS, THE VERDICT SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

Frederick H. Cohn

November 1st, 1974

Frederick H. Cohn, Esq.

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing brief and the accompanying appendix have been served on the Honorable David Trager, United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, by causing them to be delivered to the office of the United States Attorney this 1st day of November, 1974.

Frederick H. Cohn

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